in the

Supreme Court

of the

United States

SPRING TERM, 1977

~~MISC.~~ NO. 76-1638

SAMIH K. MASRI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

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The Petitioner, SAMIH K. MASRI, by undersigned counsel, respectfully requests that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, Case No. 75-4432 rendered on February 28, 1977, rehearing denied March 24, 1977.

OPINIONS BELOW

The original Opinion and Judgment of the Court of Appeals are not yet reported. Copies of the original Opinion and Judgment are included in the Appendix to this Petition. In addition, a copy of the letter remanding the case to the District Court prior to final Opinion is included in this Appendix.

JURISDICTION

The Opinion and Judgment of the Court of Appeals was entered on February 28, 1977, rehearing was denied on March 24, 1977 without opinion. By Order dated April 26, 1977, the time for filing this Petition was extended by this Court (A. 875) to and including May 23, 1977. The jurisdiction of this Court is based upon Title 28, United States Code §1254(1) and Rule 19(b), Supreme Court Rules.

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE RULE OF THE FIFTH CIRCUIT COURT OF APPEALS EXCLUDING *ALL* EVIDENCE OF RESULTS OF POLYGRAPH EXAMINATIONS, WITHOUT ALLOWING THE TRIAL COURTS' DISCRETION, IS IMPROPER AND SHOULD BE REVERSED TO BRING IT INTO ACCORD WITH OTHER CIRCUITS.

II.

WHETHER THE DEFENDANT WAS DENIED SUBSTANTIAL DUE PROCESS WHEN THE TRIAL COURT, USING A SUBJECTIVE STANDARD, DENIED A MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED, IMPORTANT EVIDENCE ADMITTEDLY CONCEALED IN VIOLATION OF *BRADY v MARYLAND*, 373 U.S. 83 (1973), BECAUSE HE FOUND IT WOULD NOT HAVE ALTERED *HIS* DECISION TO CONVICT THE DEFENDANT IN THE NON-JURY TRIAL.

III.

WHETHER THE GOVERNMENT'S PURPOSEFUL STRATEGY IN WITHHOLDING PAYMENT OF A $15,000 CONTINGENT FEE TO ITS INFORMANT/WITNESS UNTIL *AFTER* THE DEFENDANT'S CONVICTION AND SENTENCING IN ORDER TO ENHANCE THE INFORMANT'S CREDIBILITY, WAS MISCONDUCT THAT DENIED THE DEFENDANT SUBSTANTIAL DUE PROCESS

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT FIVE

No person shall be held to answer for a capital or otherwise infamous crime . . . nor be deprived in life, liberty or property without due process of law.

RULE OF CRIMINAL PROCEDURE INVOLVED

Rule 33, Federal Rules of Criminal Procedure
18 United States Code Annotated.

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

SAMIH K. MASRI, the Petitioner was tried and convicted in the Southern District of Florida, after a non-jury trial, pursuant to a one count Indictment charging him and another[1] with conspiring to violate the controlled substance laws in that they allegedly conspired to import heroin into the United States in violation of 21 U.S.C. §§952(a) and 963. (R. 1-4, 111, Tr. 1098). The Indict-

[1]The co-defendant Wally Ghalayini has filed a Petition for Certiorari with this Court on April 20, 1977 and the Petitioner Masri adopts each point set forth in that Petition as though fully set forth in the instant Petition.

ment did not charge and the Government did not prove nor attempt to prove, that an actual importation of heroin by either or both of the defendants occurred, nor did they prove that any heroin was ever contracted for by either of the defendants. (Tr. 1-1098). The defendants were sentenced on November 19, 1975 to a twelve year period of incarceration plus a three year special term of parole for the defendant Marsi and a three year period of incarceration and a three year special parole term for the defendant Ghalayini (notwithstanding the fact that Ghalayini had a proven previous involvement with heroin which was seized in Lebanon and that the defendant Masri had no proven prior involvement). (Tr. 91, R 127).

A timely Notice of Appeal was filed and after oral argument before the Fifth Circuit, the case was remanded for an evidentiary hearing on a motion to set aside the guilty verdict or in the alternative to grant a new trial based upon facts relating to the Government's major witness, the informant, Bud Miller. The motion demonstrated that: (1) Miller had testified falsely at the trial when he denied previously applying for a reward from the Internal Revenue Service in an unrelated case; (2) upon the fact that the Government had made a fifteen thousand dollar reward payment to Miller after Masri's conviction and sentencing. An evidentiary hearing was held on the matter on October 26 and 27, 1976. (3 Supp. R. 25, 26, 32, 36, 43). Thereafter the Court of Appeals upon receiving the certified findings of the trial court, affirmed the conviction. The Petitioner is scheduled to surrender to begin service of his sentence on May 31, 1977.

I.

The Polygraph

The Petitioner's defense consisted of his claim that he never intended to bring drugs into the United States and that the conversations between himself and the Government agent, Short, purportedly relating to a drug importation scheme were for the purpose of setting Short up to be defrauded by which the Petitioner and Miller would take advance monies and then have him arrested.

Petitioner offered into evidence the results of a polygraph examination confirming his innocence and set up explanation. (Tr. 704).

Although inclined toward admission of a new polygraph, by an agreed upon expert, the Court ruled that the Fifth Circuit prohibits per se the admission of polygraph results. (Tr. 707-715).

Consisting of disjointed and unconnected conversations over a two year period (Tr. 265, R. 3), the Government's case was as follows:

Bud Miller was a paid informant for the Drug Enforcement Administration beginning in the year 1969 when he met Agent Short. (Tr. 137, 148). Miller had known Masri for 10 to 12 years as of the time of trial. (Tr. 46). Miller knew Masri and Ghalayini from Sheehan Buick, where Miller was an automobile salesman and Masri and Ghalayini had been mechanics in the body shop. (Tr. 137, 138). Short asked about Masri in 1969 but did not again mention Masri to Miller until February 7, 1972,

when Short asked Miller to introduce him to Masri. (Tr. 137, 160, 193). Miller had never seen Masri with any narcotics and Masri had never talked to Miller about finding anyone to buy or sell narcotics. (Tr. 139, 177).

According to Miller's testimony, there was no contact between himself and Masri or Ghalayini until March 13, 1974 when Masri, for the first time in his acquaintance with him, began discussing Short and the fact that Short had met with Masri for the purpose of buying heroin. (Tr. 139, 177, 48, 508). Miller also indicated that Masri had offered to demonstrate to Short that he could dissolve heroin in water and then convert it back to heroin. (Tr. 48-53). No plan to import heroin was discussed at the March 14, 1974 meeting.

The first time that Short met Ghalayini relative to this case was on November 23, 1973, when they met at the Skyways Motel at Short's request. (Tr. 317). Throughout all prior conversations between Masri and Short, the only mention of Ghalayini was initiated by Short, and Masri's responses were simply that he did not want to have anything to do with Ghalayini. (Tr. 273, 277, 489, 529). The conversations between Masri and Short during this period of time pertained to many subjects, including Short's purchasing a home (Tr. 266), Short's *selling* narcotics to Masri (Tr. 276, 281, 289) and the making of some kind of narcotics deal between Short and Masri. No such deal was ever made between Short and Masri. (Tr. 528, 529). At no time was any agreement between Masri and Ghalayini mentioned. The first mention of Ghalayini as a potential participant in any dealings between Short and Masri was made by Short on November 23, 1973. (Tr. 74). Masri was continuing to decline to have any dealings

with Short, and Short suggested that they use Ghalayini as a contact between them for the purpose of establishing confidence in each other.

The next conversation between Short, Masri and Ghalayini took place at the Holiday Inn in Fort Lauderdale, Florida on January 26, 1974. (Tr. 434). According to Short, Masri stated that he only talked to Short because of Short's acquantance with Ghalayini (Tr. 437), that Masri could still get the stuff in Lebanon once there was a confidence between him and Short (Tr. 437), that Masri could dissolve heroin in water (Tr. 439), that Masri would demonstrate to Short that Masri could dissolve heroin in water and then extract it again, that this experiment would be done in Atlanta with heroin to be provided by Short, and that Masri could bring kilos from Lebanon to the Bahamas, where Short could pick it up in his boat and bring it into the United States. Short brought up Ghalayini's name and told Masri that Short was going to offer Ghalayini $2,000 for every kilo. Masri told Short not to tell Ghalayini what they were going to do. (Tr. 434-445).

Short testified to a meeting with Miller and Masri on June 4, 1974 at which time Masri allegedly indicated he would bring some heroin to Short in Atlanta by July 15, 1974 through a Bishop in the Church who imported it into the United States through Canada. (Tr. 473-475). At this meeting, Masri asked Short to advance money to him in the amount of $5,000 plus an additional $1,000 for Miller. (Tr. 477).

Masri testified that the idea of getting advance money from Short was suggested by Miller in an attempt to de-

fraud a drug dealer, to wit: Short, of his money with no intention of ever delivering drugs to him. Miller, of course, denied this. Interestingly enough, Miller received $2,000 of his first reward money out of this $6,000 which was eventually returned to Agent Short.

On August 27, 1974, Masri met with Short and in an effort to continue his scheme to defraud Short, he told him that the drug courier was arrested in Rome, Italy and that three kilograms of heroin were seized there and therefore Short's advance money had been lost. (Tr. 486). Ghalayini was not mentioned at this meeting except by Short and Masri replied that he did not want Ghalayini to know anything. (Tr. 489).

On September 27, 1974, Short and Miller went to Sam's Body Shop, Masri's place of business, to talk to Masri. (Tr. 494). Short told Masri that Short's contacts had ascertained that no one had been arrested in Rome, Italy, as Masri had stated, and accused Masri of "playing me for a sucker". (Tr. 494, 495). They then discussed some property that Masri thought he was going to sell to Short. (Tr. 497).

On October 2, 1974, Short and Miller again went to Sam's Body Shop. Masri indicated that he was distrustful of Short. Short asked Masri to return Short's money, which Masri did. (Tr. 498-502).

On April 25, 1975, Short and Miller went to Sam's Body Shop and talked to Masri. (Tr. 499, 504). Masri told Short that Masri had been indicted on income tax matters. According to Short, Masri said that he could not bring any stuff into the United States, but that after his trial, "he

was going to start sending stuff into the states on a large scale." (Tr. 506). According to Short, Masri stated that on his last trip to Lebanon, he had made all the arrangements and the stuff was ready. (Tr. 506, 507). This was the last conversation that Masri had with Short or Miller.

The Court disallowed the polygraph examination and granted the Government's motion to strike any evidence pertaining thereto. (Tr. 716).

Masri testified in his own behalf indicating that Miller, the informant, had approached him in early 1970 with relation to Short and with an attempt to steal Short's money by strongarm. Masri rejected this completely. (Tr. 734). According to Masri, Miller introduced Short to him and then continued to tell him of all the money that Short had and that if they could sell him *anything* or any kind of business with him, there was a lot of money available and that Miller expected his cut. (Tr. 736). Masri denied ever having anything to do with narcotics and denied ever having any source of narcotics to sell to Short. (Tr. 778-779). He testified that all of his conversations with Short were directed by Miller who told him that he needed to impress Short, that he was "a top man" so that together they could defraud Short of large sums of money. (Tr. 742). Both Short and Masri testified that Short had offered to sell him cocaine, yet Masri declined. (Tr. 744). Masri admitted using the names of several well-known narcotics cases which he had read about in the newspaper for the purpose of impressing Short as Miller had suggested. (Tr. 745, 746).

Masri testified that he was trying to "bluff" Short so that he could receive money from him and that the idea

of receiving the $6000 advance money was Miller's. (Tr. 749). Masri then related some bizarre stories which he had told Short concerning the bringing of heroin from the Bahamas in Short's boat and placing it in the radiator. When Short questioned overheating in the radiator, Masri replied that they could add yogurt which would prevent the overheating. (Tr. 742). Masri, a semi-literate Lebanese immigrant who operates a body shop, testified he did not know anything about chemistry or dissolving heroin in water. (Tr. 753). He further testified that it was his plan with Miller to turn Short in to the authorities after they had received advance money from him. (Tr. 754).

II.

The Reward Lie

The obvious conflict between the testimony of Masri and Miller became the central issue of the case. Most of the Government's closing argument was based upon the credibility of Miller as was most of Petitioner's closing argument as well as a vigorous cross examination. During that cross examination of Miller, he denied working for reward at all, knowledge of the reward system of the Drug Enforcement Agency or any agency of the United States, and denied having applied for a reward in the companion case which he was working, to wit: the tax evasion case of John Sheehan, the owner of Sheehan Buick. (Tr. 219, 3SR40) Knowledge of the application for reward in the Sheehan case (such application pre-dating the trial of Petitioner) came to the Petitioner's counsel when this material was turned over to counsel for Sheehan under the Government's obligations pursuant to *Brady v. Maryland*. This material was turned over by another Assistant United

States Attorney some six months after the Masri case. A hearing was held pursuant to Petitioner's motion for a new trial based on newly discovered evidence and upon remand from the Fifth Circuit Court of Appeals for that purpose, October 26 and 27, 1976.

It was established at that hearing that (1) Miller had in fact applied for a reward in the Sheehan case, (2) that IRS agents were actively involved in the Masri case and were in fact introduced to Miller by DEA Agent Short, (3) that Short was aware that Miller was cooperating in the Sheehan case, (4) that he was aware that Miller could receive a reward in the Sheehan case, (5) that Short was present in court throughout the entire Masri trial. It was further established that prior to trial defense counsel had made continuous requests to IRS agents, DEA agents and prosecutors for discovery revealing any payment of rewards or any familiarity that Bud Miller may have had with the reward system and that the application in question was not turned over. In addition, it was shown that Miller had been paid $15,000 in January after the trial and sentencing. Both he and Agent Short testified that prior to the trial there had been no specific agreement whatsoever that he would get paid anything. However, Agent Short testified that this money would not have been paid unless a guilty verdict had been returned, as was the policy of D.E.A. (Supp. Tr. 35) He further stated that this was an unusually high reward and that he had never seen a payment as quickly as the four days in this case. In attempting to question Short with respect to DEA policy and the apparent facility with which the $15,000 was paid, the trial court restricted defense counsel in their questioning.

Agent Short testified that the reason that the payment was made after the trial was over was "I don't know whether it would weaken the testimony or not, but *it would not look good* I don't think, to a jury or anyone that he had been promised an undue amount of money and we don't promise them because I can't tell." (Supp. Tr. 40). In response to the following question Agent Short made the following answer:

> Q. It would look better to pay him after when the Defendants are not aware of it, is that the thrust of your comment?
> A. Yes, sir. I don't see that I am hiding anything there. I did not promise him anything like that either and we don't pay until after trials. (Supp. Tr. 41).

The trial court made findings of fact and denied the motion for new trial stating that it found no agreement prior to trial to pay money to Bud Miller; that the Government had failed in its duty under *Brady v Maryland* to turn over the application for reward made by Bud Miller in the Sheehan case prior to the instant case; that Miller had testified falsely when he denied applying for a reward in the Sheehan case, yet this testimony was only an error and not perjurious. The Court further found that Miller had no prior agreement nor knowledge that he would receive a reward in the Masri case if there was a conviction and at best he might have hoped for reward, but had no knowledge or certainty of getting one. (Supp. Tr. 150-156). Notwithstanding these findings and notwithstanding the Government's failure to correct Miller's perjurious statement, the Court refused to grant a new trial on these bases, stating that *he*, as trier of the fact.

would not have changed his verdict had he known of Miller's application for a reward in the Sheehan case. (Tr. 156-157) In reaching this conclusion, the Court stated that there was a wealth of evidence corroborating the testimony of Miller as to conversations and meetings with Masri. However, this finding neglected the fact that Masri testified to conversations with Miller in which Miller suggested the language which Masri should use in talking to Short so that *they* could defraud Short out of money. There was no corroboration to any of these conversations.

The Court specifically found that he would not have been affected by this testimony and that we need not speculate as to what a jury would have been affected by. (Supp. Tr. 158)

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW PRESENTS AN IMPORTANT EVIDENTIARY QUESTION AS TO THE ADMISSION OF THE RESULTS OF POLYGRAPH EXAMINATION AND IT CONFLICTS WITH DECISIONS IN THE SIXTH, SEVENTH, EIGHTH AND NINTH CIRCUIT COURTS OF APPEAL.

The decision of the Fifth Circuit Court of Appeals recognizes that its rule which forbids the admission of polygraph examination test results in all cases without allowing the trial court any discretion, is at variance with other circuits. The Fifth Circuit has well established its rule of per se inadmissibility in federal criminal cases.

See, e.g. *United States v Cochran*, 499 F.2d 380, 393 (5th Cir. 1974); *United States v Frogge*, 476 F.2d 969, 970 (5th Cir. 1973); *United States v Gloria*, 494 F.2d 477 (5th Cir. 1974). Decisions in three other circuits appear to be in accord with the decisions of the Fifth Circuit. See, e.g. *United States v Bandel*, 244 F.2d 833 (2nd Cir. 1957); *United States v Rogers*, 419 F.2d 1315 at 1319 (10th Cir. 1969); *United States v Wainwright*, 413 F.2d 796 (10th Cir. 1969); *United States v Skeens*, 494 F.2d 1050 at 1053 (D.C. Cir. 1974).

The opinion in the instant case recognizes that other circuits allow polygraph admissibility to be a question for the trial court's discretion. The decision cites *United States v Infelice*, 506 F.2d 1358, (7th Cir. 1974); *United States v Penick*, 496 F.2d 1105 (7th Cir. 1974), showing the rule of the Seventh Circuit permitting the trial court to exercise its discretion in this regard. In accord with this are several decisions of the Sixth, Eighth and Ninth Circuits. See, e.g. *United States v Mayes*, 512 F.2d 637 (6th Cir. 1975), *cert den.* 95 S.Ct. 2629; *United States v Tremont*, 351 F.2d 144 (6th Cir. 1965); *United States v Oliver*, 525 F.2d 731 (8th Cir. 1975); *United States v Watts*, 502 F.2d 726 (9th Cir. 1974); *United States v DeBetham*, 470 F.2d 1367 (9th Cir. 1972), *cert. den.* 93 S.Ct. 2299; *United States v Salazar-Gaeta*, 447 F.2d 468 (9th Cir. 1971).

The majority of the opinions in the other circuits, by [illegible] discretion in the trial court, do not require the [illegible] of polygraph examinations, however, the other [illegible] permit discretion so that in the appropriate case, such as the instant case, the trial court may set up its own standards and permit the use of polygraph examina-

tion. It is respectfully urged that the rule in the Seventh Circuit that "it is clear that the admission of such evidence is within the discretion of the trial judge", *United States v Infelice, supra* at 1365, is the better rule since it permits the trier of the fact to exercise control over the trial and to determine in which case a sufficient scientific background has been laid, a need had been demonstrated, or there are other compelling reasons to permit the use of a scientifically correctly administered polygraph examination.

Petitioner recognizes in urging that this Court adopt a national standard permitting discretion in the trial courts, that not all cases will be appropriate for the use of polygraph examinations. In the case of *United States v Ridling*, 350 F.Supp. 90 (E.D.Mich. 1972), the Court held in admitting a polygraph examination under rigid conditions that certain types of cases were ideal for the acceptance of polygraph evidence since it can be particularly useful in detecting whether a person acted willfully or knowingly. *United States v Ridling, supra* at 93, 98. The Ridling decision is particularly compelling in the instant case since the great majority of the evidence for both the Government and the Defendant was similar. The only major difference being the question as to whether or not the Defendant willfully or knowingly conspired to import heroin or whether he intentionally conspired to defraud a person who he believed to be a major drug dealer. Among these rigid conditions set forth by the *Ridling* court was that the Court appoint the expert to conduct the examination from a panel of three supplied by the parties and that the expert needed to be able to express an opinion as to whether or not the Defendant was telling the truth. In the instant case, a strikingly similar set of

circumstances arose. The argument relating to the admission of polygraph evidence centered around the fact that this was a case involving an issue with which the Court needed some help to "resolve the issue of intent". (Tr. 705) The Court went on to state,

> [T]his might be one of those rare cases where some sort of qualified experienced professional guidance, if it can be obtained, would be helpful in determining intent, because we are down to that point in the case, and I know there are some straws in the wind, there are some clues along the way that will resolve the question of intent . . . I have never seen one like it; that is where everything is admitted, but they say "we just did not have that requisite intent, we did it to defraud and to cheat, we did not do it to violate the narcotics laws." (Tr. 707, 708).

All of the polygraph argument preceded a recess for the day. When court resumed the next day, the Government had submitted a memorandum reflecting the Fifth Circuit per se inadmissibility rule at which time the Court withdrew from its prior remarks and ruled the polygraph inadmissible.

It would appear clear that at a time when new scientific evidence such as voice prints are being admitted into evidence, see *United States v Baller*, 519 F.2d 463 (4th Cir. 1975); *United States v Stifel*, 433 F.2d 431 (6th Cir. 1970), there should be no absolutest rule forbidding similar scientific evidence when properly presented. The court in *United States v Baller, supra* observed that "absolute certainty of result or unanimity of scientific opin-

ion is not required for admissibility" of a new scientific technique. (at 466) Thus, it is respectfully submitted that this Honorable Court should set the guidelines for, or at least permit the trial courts to, develop a discretionary evidentiary rule for the admission of important scientific testimony relating to polygraph examinations, particularly in cases such as the instant case where the results were so crucial to the outcome of the trial.

II

THE DECISION BELOW PRESENTS AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW CENTERING ON THE DEFENDANT'S RIGHT TO HAVE THE EFFECT OF A CLEAR VIOLATION OF *BRADY v. MARYLAND* JUDGED ON AN OBJECTIVE STANDARD.

This Petition presents a unique situation in which both the trial court and Court of Appeals found a violation of the principles of *Brady v. Maryland*, 373 U.S. 83 (1973) and yet the trial court denied a new trial on the subjective basis that the new evidence would not have affected *his* verdict had it been known at the time of trial. The result of the use of such a standard is that a jury trial and non-jury trial stand on different footings in regard to the post trial relief. It is unthinkable that in a jury trial, jurors would be called in and asked whether a new revelation of certain important evidence could have changed their verdict. Rather the test as set forth by this Honorable Court in *United States v. Agurs*, ___ U.S. ___, 96 S.Ct. 2392 controls:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

The *Agurs, supra* standard must be considered in light of the unusual nature of the trial below. There was an admission by the Defendant that all of the conversations which were testified to between himself and the undercover narcotics agent, Jack Short, occurred. The Defendant's entire defense was that it was his intent to defraud Agent Short who he believed to be a major international narcotics dealer, by receiving advance money from him and then turning him in to the police. Masri also contended that Miller, the informant, was well aware of this and encouraged his efforts by telling him exactly what to say to Short in order to build himself, Masri, up as an international narcotics dealer. As has been set forth in Point I above, the polygraph examination which was proffered supported Masri's position. The facts as stated herein make it clear that the fact finder, to wit: the district judge, was required to determine whether Miller or Masri was giving

credible testimony. Under both versions of the facts, the statements of Agent Short relating to his conversations with Masri were accurate.

It is thus obvious that impeachment testimony relating to Miller was highly crucial. The Government argued in its closing argument that Miller's credibility was crucial and the Court stated that deciding between Miller's version and Masri's version was a very difficult task which hung in the balance. (Tr. 705-708). Thus, the two factors raised on the motion for new trial relating to Miller's credibility were extremely important. The fact that Miller had testified falsely (either intentionally or by oversight) that he had never previously applied for a reward, created an obvious false premise for the continuation of his cross examination. When this is coupled with the fact that Miller received a post trial award of Fifteen Thousand Dollars after the conviction and sentencing of Masri, it becomes clear that his credibility was in question.

This Honorable Court in reversing a conviction in *Giglio v. United States*, 405 U.S. 150 (1971) pointed out the absolute necessity of full government candor with relation to promises of immunity, leniency or rewards.

Indeed, the facts in the instant case are strikingly similar to those in *Giglio, supra*. Testimony was given with relationship to rewards (in Giglio, promises), the statement was untrue, the Government knew or should have known the answer was untrue and the statement related to an important fact. In both cases the Government made no effort to correct the misstatement as was their duty then and now. See, *Napue v. Illinois*, 360 U.S. 264 (1959).

On remand, the trial court found that the prosecutor in the instant case had no *actual* knowledge of the application for reward in the Sheehan case. This fact, even if true, is nevertheless irrelevant, since the Government can only speak through one voice. Notwithstanding the maxim of the law as set forth in *Santobello v. New York*, 404 U.S. 257 (1971), that the government through one prosecutor is charged with knowledge of the actions of another prosecutor or another prosecutorial branch of government, the facts in the instant case indicate actual knowledge. The testimony reflected that the informant Miller was in fact introduced to the IRS agents for the purpose of making the Sheehan case by Special Agent Short. In addition, the facts reflect that throughout the Masri narcotics case, a Special Agent of the IRS was actively working on a tax case and was in constant contact with Agent Short. Agent Short was present throughout all of the testimony and made no effort to correct Miller's misstatement.

Ironically, the material relating to the reward application was actually turned over in the Sheehan case by another Assistant United States Attorney in Miami approximately six months after the Masri sentencing. That Assistant United States Attorney saw her clear duty to turn such material over under *Giglio, supra* and *Brady, supra*. The Government still made no effort to correct the Masri record and it was only by chance that Petitioners learned of this evidence.

After the trial court found a violation of *Brady v. Maryland, supra* with regard to the reward application (which is compounded by the post-trial payment of the $15,000 reward), the Court took it upon himself to decide that these matters would not have affected *his* decision.

It is patently unfair to permit the trial court to make a post-trial finding, some thirteen months after the trial that these matters would not have affected *his* verdict. There is no question but that an objective standard must be applied to *Brady* violation material. That objective standard must be whether the evidence could create a reasonable doubt in the mind of a jury or a fact finder. The subjective findings of the trial court, that he was not concerned with the informant's obvious trial posture as a patriot interested only in ferreting out crime, does not answer the question, whether a reasonable fact finder would be affected by the knowledge that the informant was not only aware of the Government reward system but had in fact applied for a reward in a similar situation. This is particularly true where the questioning of the informant was specifically directed at this area and where specific questions relating to the information which he supplied in the Sheehan case (wherein he applied for the reward) were directed at him and answered falsely.

Petitioner urges this Court to consider the fact that a determination by the trial court in hindsight after the Court itself had been involved in the fact finding process, had determined the witnesses to be credible, had read presentence reports and had in fact sentenced the Defendant, was an impossible task in mental gymnastics. The Court admitted at the hearing that it was not attempting to measure the effect of the prejurious statement upon an objective reasonably minded factfinder, but rather upon the judge himself as trier of the facts.

The prosecutor in closing argument made constant references to Miller and his credibility. (Tr. 1007, 1010, 1020, 1024, 1028, 1031). Her closing argument included

strong language to the effect that the informant provided this information purely as a good citizen and scoffed at Petitioner's counsel's argument.

> Mr. Bierman testified (sic) as to some government method of rewarding people. Nothing like that is in evidence and I don't know that to be the case, Your Honor. (Tr. 1085, 86)

She went on to state

> Your Honor, as trier of the facts has to decide if Bud Miller is credible. (Tr. 1092).

It would seem clear that if an objective test were used in a case where the credibility of the informant vis a vis that of the defendant was the crucial issue, where there was a denial of any reward motivation, and where a false statement was made at trial with regard to that reward, that a reasonable fact finder would have a reasonable doubt as to the guilt of the defendant. The very minimal requirements of due process suggest that this Court reverse the conviction and order a new trial.

III

THIS CASE PRESENTS AN IMPORTANT ISSUE RELATING TO GOVERNMENTAL CONDUCT WHICH HAS NOT BEEN BUT SHOULD BE ADDRESSED BY THIS COURT UNDER ITS SUPERVISORY POWERS.

This case involved a four-year investigation of an identifiable target of the Drug Enforcement Agency, to

wit: Sam Masri, and the payment of a Fifteen Thousand Dollar reward to an informant/witness after Masri's conviction. Strikingly, not one single particle of narcotic drug be it heroin, cocaine or marijuana, was produced throughout the conspiracy, nor was there any evidence of the actual existence of any heroin or other drugs. The entire trial rested upon the conflict between the informant Miller and the Defendant Masri. It was Masri's position throughout, as has been stated before, that he was urged to tell lies to Agent Short so that he and Miller, the informant, could defraud Short who Miller had stated was a wealthy drug dealer.

While admittedly Masri's motives in defrauding the undercover agent, who he believed to be a drug dealer, were not perfect, the Government process of finding a target, creating a case against him and thereafter paying an enormous reward cannot stand.

The Court of Appeals in its decision, found that there was no contingency arrangements such as the one condemned in *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962). While the facts at the post-trial hearing reveal that there was no testimony showing a concrete agreement between Short, in behalf of the DEA, and Miller for the receipt of an reward, there was proof that Miller had previously received payment in other cases and had applied for a reward in an Internal Revenue Service case. If it is possible to avoid the evil of contingency payments condemned in *Williamson, supra* by simply setting up a pattern of post-trial payments to an informant/witness, then the *Williamson, supra* condemnations will be meaningless. Judge John R. Brown wrote in *Williamson* in condemning a contingent fee arrangement:

> There comes a time when enough is more than enough — it is too much. When that occurs, the law must condemn it as offensive whether the method used is refined or crude, subtle or spectacular. *Williamson, supra* at 445.

What could be more subtle than the instant case in which the informant/witness was aware of the reward system, yet denied that knowledge and after the conviction and sentencing was paid a huge reward.

It is respectfully suggested that the instant case meets the tests in *United States v. Russel*, 411 U.S. 423, 93 S.Ct. 637 (1973), wherein this Court stated it could be "presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." 411 U.S. at 431, 432. What we have in the instant case is the possibility and probability that a government informant, for the purpost of receiving a large payment, would create a case by his own imaginations, persuade a defendant to make statements that could be used to indicate that he was involved in a drug conspiracy while at the same time convincing the defendant that he and the informant were defrauding a drug dealer and planned to turn him in to law enforcement. In the instant case, the entire defense showed that it was purely the word of the informant Miller as opposed to the word of the Defendant Masri. The true motivations of the informant were hidden from the Court, as trier of the facts, and from the Defendant's counsel. After the trial and conviction, the informant received the reward that he was hoping for and we suggest rightfully expecting. Unlike the entrapment cases, the instant case involved

no actual production of a narcotic drug by the Defendant Masri or his co-defendant Ghalayini. The payment of bounty fees have been condemned in numerous courts. See *United States v. Ladley*, 517 F.2d 1190, 1193 (9th Cir. 1975).

There is absolutely no way to delve into the secret conversations between a long-term informant and an experienced drug agent. It may well be that no specific promise was ever made by Short to Miller, yet the wink, inuendo and friendly pat on the back to an experienced informant lets him know that his reward will not wait for heaven but will come in cash when the trial is concluded.

While it has been a long-standing policy of the federal government to pay rewards, they are usually based on the amount recovered in terms of drugs, or the amount recovered in terms of taxes or custom duties or proof of an actual substantive crime through testimony of an informant and corroborating physical evidence. In the instant case, there was only conspiracy talk which could have been created by the informant for his own purposes of receiving the reward.

The error was compounded in this case since the agent admitted that this unusually large reward paid faster than he had ever paid before, was not paid prior to trial because he felt it would not have been looked upon favorably by the trier of facts. This attempt to paint a glowing picture of the informant as a public spirited citizen by withholding his reward until after the trial cannot be countenanced. This Honorable Court has invoked its supervisory power on many occasions, e.g. *Marshall v. United States*, 360 U.S. 310 (1959) (reversing conviction based on jury's

newspaper exposure); *United States v. Hale*, 422 U.S. 171 (1975) (reversing conviction because the defendant was impeached based upon the exercise of his constitutional right to silence); *McNabe v. United States*, 318 U.S. 332 (1943) (unwarranted delay before preliminary hearing); *Mesarosh v. United States*, 352 U.S. 1 (1956) (ordering a new trial based upon the testimony of an unsavory informant who the government admitted had committed perjury in other cases).

In the instant case, not only was the informant paid a huge reward, inappropriate with the work which he had done at a time when it could not be used to impeach him, but in addition, the informant made a false statement as to his prior requests for rewards. The Petitioner would respectfully suggest that the Court's statement in *Mesarosh*, *supra* is particularly applicable here:

> The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. at 14.

Accordingly, Petitioner respectfully requests that this Court grant a certiorari review and set a firm national policy as to what conduct involving informant witnesses would be permitted in the trial of federal criminal cases under the supervisory power of this Honorable Court.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

BIERMAN, SONNETT, BEILEY
SHOHAT & OSMAN, P.A.

DONALD I. BIERMAN
Attorney for Petitioner

APPENDIX

United States Court of Appeals,
Fifth Circuit.

No. 75-4432.

UNITED STATES of America,
Plaintiff-Appellee,
v.

Samih K. MASRI and Wally Ghalayini,
Defendants-Appellants.

Feb. 28, 1977.

Defendants were convicted before the United States District Court for the Southern District of Florida, James Lawrence King, J., of conspiracy to import heroin, and they appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that although form entitled "Waiver of Jury and Special Findings" contained only one line for the attorney's signature, use of such form was not error, especially since no request was ever made for special findings and form did not make the two waivers conditional on each other that, in any event, any error was harmless, that even if incriminating statements allegedly made prior to instigation of conspiracy were technically inadmissible to prove the truth of their contents such production was harmless since substance thereof was repeated in post-conspiracy conversation and that although at trial informer admitted to having received $500 expense money subsequent discovery that he received an additional $15,000 after convictions did not warrant new trial where addi-

tional sum was not expected and was given only on recommendations of undercover agent.

Affirmed.

1. Criminal Law — 1144.13(3)

In reviewing claim of sufficiency of the evidence to support conviction the Court of Appeals views the evidence in the light most favorable to the Government.

2. Criminal Law — 1166(1)
Jury — 29(6)

Although form entitled "Waiver of Jury and Special Findings" contained only one line for the attorney's signature use of such form was not error, especially since no request was made for special findings and form did not make the two waivers conditional on each other; in any event, any error was harmless since trial court had not engaged in any sort of coercive behavior and defense counsel represented that, in his opinion, the waiver of trial by jury and special findings was voluntarily and understandably made. Fed.Rules Crim.Proc. rule 23(c), 18 U.S.C.A.

3. Criminal Law — 388

Results of lie detector tests are inadmissible in federal criminal cases.

4. Criminal Law — 1169.2(6)

Even if incriminating conversations between government agent and alleged contact with importer of heroin were technically inadmissible to prove the truth of their contents, in that statements were admitted prior to existence of a conspiracy, such introduction was harmless in that substance of the conversations was repeated several times after the alleged importer had become an active participant in the conspiracy and, furthermore, there was ample evidence to convict the importer. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 1002(a), 1013, 21 U.S.C.A. §§ 952(a), 963.

5. Criminal Law — 260.11(2)

In a nonjury case the trial judge is presumed to rest his verdict on admissible evidence and to disregard the inadmissible.

6. Criminal Law — 986

Although sentence imposed was exactly that recommended in presentence investigation report, which judge declared his intention not to consider in any way, defendant was not improperly sentenced where Government viewed defendant as major international heroin smuggler and recommended 15-year sentence, both the Government and the defense presented witnesses whose testimony was to be considered in sentencing and trial court reaffirmed its intent to disregard the entire report before sentencing. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 1002(a), 1013, 21 U.S.C.A. §§ 952(a), 963.

7. Criminal Law — 913(1)

Payment of compensation to informer who did substantial service for Drug Enforcement Agency did not require a new trial where although at trial informer admitted to having received $500 expense money it was later discovered that he received an additional $15,000 following convictions where trial court found that informer had no expectation whatsoever of receiving the sum awarded by the agency and it was only given to him on recommendation of undercover agent after conviction; there was no improper factual inducement since informer had no reason unknown to the trial judge to perjure or embellish his testimony. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 1002(a), 1013, 21 U.S.C.A. §§ 952(a), 963.

8. Criminal Law — 940

Informer's erroneously informing defense counsel on cross-examination that he had not received a reward for his assistance in a particular Internal Revenue Service investigation did not rise to level of materiality warranting new trial where trial court concluded that had the truth been known it would not have altered the verdict.

Appeals from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, and TUTTLE and TJOFLAT, Circuit Judges.

TJOFLAT, Circuit Judge:

The defendants-appellants, Masri and Ghalayini, where convicted in a joint, non-jury trial of conspiracy to import heroin in violation of 21 U.S.C. §§ 952(a) & 963 (1970). They assert multiple errors on appeal. Finding each of them either meritless or harmless, we affirm.

I. Sufficiency of the Evidence

[1] Initially, the appellants claim that the evidence before the district court was insufficient to support their convictions. Viewing the evidence in the light most favorable to the Government, as mandated by Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we disagree. The evidence adduced at trial demonstrated that Masri intended to import heroin into the United States from his contacts in Lebanon. Both he and his brother traveled there to make arrangements and supervise operations. Moreover, ample testimony established that Ghalayini agreed to act, and did act, as a contact between Masri and the purported purchaser, Agent Short of the Drug Enforcement Agency (DEA). In the light of this evidence, we conclude that it was well within the trial court's discretion to discredit Masri's contention that he only dealt with Short to ensnare him in an elaborate con game and that he never did intend to traffic in drugs.

II. Pre-trial Proceedings

[2] The appellants next assert that this proceeding must be remanded to the trial court for special findings of fact by the trial judge. When they asked for a bench trial, the court had them sign a form which is entitled "Waiver

of Jury and Special Findings"[1] The use of the form, reproduced in the margin, is claimed to link impermissibly the

[1]The Southern District of Florida's Form 20—Criminal is reproduced below:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. ———
UNITED STATES OF AMERICA,
Plaintiff,
vs.
Defendant.

WAIVER OF JURY AND SPECIAL FINDINGS

The undersigned Defendant, having been fully advised in the premises, hereby waives the right to a trial by Jury and requests the Court to try all charges against him in this case without a Jury.

The undersigned Defendant further waives the right to request any special findings of fact as provided by Rule 23(c) of the Federal Rules of Criminal Procedure.

——— ———
(Date) (Defendant)

The undersigned attorney represents that prior to the signing of the foregoing Waiver, the Defendant above named was fully advised as to the rights of an accused under the Constitution and the law to a speedy and public trial by an impartial Jury, and the right to request special findings in a case tried without a Jury; and counsel further represents that, in his opinion, the above waiver of trial by jury and special findings is voluntarily and understandingly made, and recommends to the Court that said Waiver be approved.

——— ———
(Date) (Attorney for Defendant)

The United States Attorney hereby consents that the case be tried without a Jury and waives the right to request any special findings of fact as provided by Rule 23(c) of the Federal Rules of Criminal Procedure.

——— ———
(Date) (Assistant United States Attorney)

Aproved this ——— day of
———.

———
UNITED STATES DISTRICT JUDGE

two waivers,[2] making the waiver of fact finding involuntary.

Reliance is placed on United States v. Livingston, 459 F.2d 797 (3d Cir. 1972) (en banc) and Howard v. United States, 423 F.2d 1102 (9th Cir. 1970). In both Livingston and Howard the trial court had explicitly refused to grant a bench trial unless special findings were waived. Such coercive conduct was disapproved in both instances.[3] In the present case, however, the trial court did not engage in any sort of coercive behavior, and there was never a request made for special findings. The form does not make the two waivers conditional on each other, and no attempt was ever made by any party to reserve the right to request special findings. Instead, the attorney for the defendant represented that, in his opinion, "the above waiver of trial by jury and special findings is voluntarily and understandably made . . . ."[4]

[2]Federal Rule of Criminal Procedure 23 states in relevant part,
(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.
* * *
(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition or request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

[3]The Livingston court stated, "The district court cannot, by procuring such a pre-trial waiver, avoid its responsibility to make findings of fact when presented with a timely request." 459 F.2d at 798. The Ninth Circuit held in Howard, "We cannot condone an avoidance of Rule 23(c) by the expedient of conditioning a jury waiver on a waiver of special findings. The defendant's right to such findings is not trivial, and his exercise of that right is not to be impaired by the exertion of pressure from the court." 423 F.2d at 1104.

[4]See note 1 supra.

We recognize the cogency of the appellants' argument. The form utilized has only one line for the attorney to sign a waiver of both his jury trial and his right to special findings. Parties could easily be misled to conclude that one must waive both or neither. The form, therefore, by the way it is structured violates to some extent the spirit of our admonition in United States v. Johnson, 496 F.2d 1131, 1137 (5th Cir. 1971):

> In some situations, it may be impermissibly coercive for a trial court to condition a non-jury trial on the waiver of special findings of fact. Special findings are necessary, especially in a complex case, for an intelligent appellate review of a defendant's contentions. Whether the defendant desires special findings should normally be his decision alone.

Nevertheless, in the light of the totality of the circumstances recounted, we hold that error was not committed in this instance. In addition, we are convinced after our independent examination of the record that, even if there has been error, it would have been harmless.[5]

III. Trial Proceedings

[3] The appellants also complain of several events which took place during trial. The first is that the trial court, upon the urging of the Government, refused to allow into evidence the results of a polygraph test taken by Masri. Unlike some other circuits, the rule is well established in this circuit that the results of lie detector tests are

[5] A simple restructuring of the form found in note 1 supra to provide a separate line for signature after each waiver would help eliminate the present ambiguities of that form.

inadmissible in federal criminal cases.[6] United States v. Cochran, 499 F.2d 380, 393 (5th Cir. 1974); United States v. Frogge, 476 F.2d 969, 970 (5th Cir. 1973). It is evident that the trial court properly refused to consider the results of Masri's test.

[4, 5] Next, Ghalayini argues that the court committed reversible error in admitting into evidence incriminating conversations between Masri and Agent Short prior to the instigation of the conspiracy between Masri and himself. The Government counters that at the time the conversations were made a conspiracy already existed between Masri and his Lebanon connections and that a defendant joining the conspiracy later is bound by prior statements made in furtherance of the conspiracy. See United States v. Jones, 480 F.2d 954 (5th Cir.), cert. denied, 414 U.S. 1071, 94 S.Ct. 582, 38 L.Ed.2d 476 (1973).

Without so deciding, we find that even if the statements were technically inadmissible to prove the truth of their contents, such introduction was harmless.[7] The substance of the conversations was repeated several times after Ghalayini had become an active participant in the conspiracy. Moreover, a trial judge is presumed to rest his verdict on admissible evidence and to disregard the inadmissible. As previously noted, there was ample evidence to convict Ghalayini.

[6] In the Seventh Circuit, it is in the trial court's discretion as to whether or not to allow polygraph results into evidence. United States v. Infelice, 506 F.2d 1358 (7th Cir. 1974); United States v. Penick, 496 F.2d 1105 (7th Cir. 1974).

[7] It is unnecessary for us to determine, of course, whether other, independent grounds existed for the admissibility of the challenged utterances.

In a similar vein, Masri contends that statements made by Ghalayini should not have been admitted. The trial judge ruled, however, that there had already been introduced sufficient evidence of a conspiracy between Masri and Ghalayini at the time the statements were offered for those statements to be considered against his alleged co-conspirator. See Migliore v. United States, 409 F.2d 786 (5th Cir.), cert. denied, 396 U.S. 975, 90 S.Ct. 449, 24 L.Ed.2d 444 (1969); Fed.R.Ev. 801(d)(2)(E). We find the trial court's conclusion amply supported by the record. Again, even if there was error here, we presume that the district court would have properly sifted the evidence before reaching his verdict. There was ample unchallenged evidence before the court to prove the indictment.

IV. Sentencing of Masri

[6] The appellant Masri alleges that he was improperly sentenced. After Masri objected to certain material in his presentence investigation report, the judge declared his intention not to consider the report in any way. Both parties agreed to that solution. The trial court, however, eventually sentenced Masri to a term of twelve years imprisonment with a special parole term of three years, the exact recommendation of the report.

Masri argues that this coincidence in sentencing establishes a prima facie showing that the trial court reneged on its word and actually did consider the report, depriving him of the opportunity to contest certain charges and the recommendation on sentencing. We decline to import such an evil design to the court. Both the Government and the defense presented witnesses whose testimony was to be

considered in sentencing. The Government viewed the defendant as a major international heroin smuggler and recommended a fifteen year sentence. The court reaffirmed its intent to disregard the entire report before sentencing. In this light, we believe that the trial court acted well within its broad discretion when it sentenced Masri. See United States v. Menichino, 497 F.2d 935, 945 (5th Cir. 1974).

V. Informer Compensation

[7] The appellants next claim that the payment of compensation to an informer, Miller, who did substantial service for the DEA in this case was violative of the precepts of Williamson v. United States, 311 F.2d 441 (5th Cir. 1962). At trial Miller admitted to having received $500 expense money for his work on the case from DEA. It was later discovered, however, that he received an additional $15,000 after the convictions of the defendants. A new trial motion was entertained by the trial court after oral argument before us. After a hearing at which the circumstances surrounding the additional payment were fully developed, a new trial was denied.[8]

The trial court found that Miller had had no expectation whatsoever of receiving the sum awarded by DEA and it was only given to him, upon the recommendation of Agent Short, after the convictions had been obtained. These conclusions are substantially supported by the record, and they distinguish this case from Williamson. In Williamson the informer had been approached and offered bounty

[8] We delayed decision in this case until the district court, pursuant to our instructions, transmitted to us its certified order and a transcript of the proceedngs below.

money on two defendants if he could uncover enough legally sufficient evidence to convict them. In this case there was no such improper, financial inducement. Miller had no reason unknown to the trial judge to perjure or embellish his testimony. See United States v. Ladley, 517 F.2d 1190, 1193 (9th Cir. 1975); United States v. Gardner, 516 F.2d 334, 343 (7th Cir.), cert. denied, 423 U.S. 861, 96 S.Ct. 118, 46 L.Ed.2d 89 (1975); United States v. Jett, 491 F.2d 1078, 1081 (1st Cir. 1974). See also United States v. McClure, 546 F.2d 670 (5th Cir. 1977).

VI. Brady Violation

[8] The district court also considered an alleged Brady[9] violation at the new trial hearing. It was admitted at that hearing that Miller had erroneously informed Masri's counsel on cross-examination that he had not received a reward for his assistance in a particular Internal Revenue Service investigation. Conceding this to be a Brady violation, the court next considered whether the omission was material. The proper standard for materiality has been recently elaborated in United States v. Agurs, ___ U.S. ___, 96 S.Ct. 2392, 2401-02, 49 L.Ed.2d 342 (1976):

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist,

[9]Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

> constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. (Footnotes omitted.)

This standard was meticulously followed by the trial court, and it concluded that, had the true facts been known, they would not have altered the verdict. We can find no reason to disturb that finding.

VII. Conclusion

In sum, all of the points of error raised by the appellants are without merit. The convictions should be, and are hereby, AFFIRMED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

October 12, 1976

EDWARD W. WADSWORTH
Clerk

[RECEIVED OCT 14 1976]

TO ALL COUNSEL OF RECORD

No. 75-4432—United States of America vs.
Samih K. Masri and Wally Ghalayini

(U.S.D.C. No. 75-417-Cr-JLK)

Dear Counsel:

The Court directs that I send this letter to counsel and to the District Court.

Since the District Court has before it a post conviction motion for new trial (preset for hearing on October 19, 1976) and on the eve of argument in this Court papers were filed with this Court raising the question about the payment of $15,000.00 by the government to a special agent witness, the Court has determined to defer decision in the instant appeal until these matters are disposed of before.

The Court urges that by suitable amendment to the pending motion for new trial the matter of the $15,000.00 be incorporated so that a full factual record can be developed, hopefully at the same time as the other matter ascertained in the pending motion for new trial.

On the completion of the hearing on all such matters the District Court shall certify a copy of its findings of facts and conclusions to this Court as soon as reasonably possible. If the District Court decides in whole or in part the motion for new trial (as expanded) and one or more of the defendants decide to appeal, the notices of appeal shall be promptly filed. The Clerk of this Court will thereupon specify an expedited shortened schedule for filing the record in typewritten form of such proceedings and also fix the expedited filing date of typewritten briefs. Such briefs are to be directed solely to the matters raised on the hearing of the motions for new trial without repetition of the arguments previously made. The Court then plans to dispose of the whole case at one time.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By: Barry W. Stiebing

Barry W. Stiebing
Deputy Clerk

BWS:gc

Mr. Donald I. Bierman
Mr. Thomas Almon
Mr. Bernard S. Yedlin
Mr. Samuel A. Alter, Jr.
Mr. Samuel Sheres

cc: Hon. James Lawrence King
Mr. Joseph I. Bogart

No. 76-1638

In the Supreme Court of the United States

OCTOBER TERM, 1977

SAMIH K. MASRI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1638

SAMIH K. MASRI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 547 F. 2d 932.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1977. A petition for rehearing was denied on March 24, 1977. Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to May 23, 1977, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to admit polygraph evidence offered by petitioner.

2. Whether it was proper for the judge who presided at petitioner's jury-waived trial to rule on petitioner's motion for a new trial alleging that false testimony in the government's case had tainted the verdict.

3. Whether the post-trial payment of a reward to an informant who testified against petitioner, where the informant had no pretrial expectation of receiving a reward, violated due process of law and warranted reversal of petitioner's conviction.

STATEMENT

After a jury-waived trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to import heroin into the United States, in violation of 21 U.S.C. 952(a) and 963. He was sentenced to 12 years' imprisonment and three years' special parole. The court of appeals affirmed (Pet. App. 1-13).

The evidence showed that petitioner was the central figure in a conspiracy to smuggle a large quantity of heroin from Lebanon into this country. Undercover Agent Jack Short of the Drug Enforcement Administration infiltrated the conspiracy in its earliest stages. From September 1973 until April 1975, petitioner met with Agent Short approximately 14 times to negotiate a long-term supply contract whereby petitioner would arrange a monthly delivery of between 10 and 20 kilos of 97.5% pure heroin from his associates in Lebanon to Agent Short in exchange for a substantial commission (Tr. 77-78, 124-134, 266-318, 434-447, 457-461, 474-480, 486-491, 502-507).[1] At first it

[1]"Tr." designates the transcript of petitioner's trial. "H." designates the transcript of the hearing on petitioner's motion for a new trial.

was agreed that Short would take delivery of the drug in the Bahamas (Tr. 291-292), but the proposed delivery site was later changed to Atlanta, Georgia (Tr. 77, 474-475). Petitioner told the agent that he planned to transport the heroin dissolved into several gallons of water and that, once it arrived at its destination, the drug would be precipitated out of solution for futher processing (Tr. 310, 439-441; 645-662). Twice during this period, petitioner traveled to Lebanon to consult with his suppliers there (Tr. 18-19, 33-34, 134; G. Exhs. 1, 4, 37).

From the outset of his dealings with Short, petitioner harbored suspicions that Short might be a government agent and repeatedly sought assurances from Short that he could be trusted. Several months after their first discussions, the two agreed that Wally Ghalayini, a mutual acquaintance with whom both had conducted drug-related business in the past, could establish a confidence between them that would permit their proposed transactions to go forward (Tr. 307-311). Ghalayini subsequently agreed to aid the importation scheme (Tr. 318, 451; G. Exhs. 17, 18).[2]

In March 1974, as the negotiations with Agent Short neared fruition, petitioner and Ghalayini contacted one of petitioner's co-workers, Bud Miller, who had introduced Agent Short to petitioner. They asked Miller for proof that Short was not a government agent. Unbeknownst to them, Miller was a government informer. Miller reassured the two men that Short was trustworthy, and during the following months Miller acted as a go-between for Short and petitioner, relaying information concerning arrangements for the first delivery (Tr. 49-57, 89-92, 100-138, 268).

[2]Ghalayini was tried jointly with petitioner and was convicted of the same offenses.

Before any deliveries were made, however, petitioner and Ghalayini were arrested.

Petitioner did not dispute Agent Short's account of their numerous meetings. Rather, he testified that his attempt to negotiate a sale of heroin to Short was part of a scheme devised by Miller to defraud Short of the purchase price. According to petitioner, he and Miller planned to turn Short over to the authorities after they had received advance payment for the heroin. Petitioner claimed that he had never intended to import any heroin, despite his contrary representations to Short, and he denied that he knew anyone in Lebanon who could have supplied him with the drug (Tr. 732-781).

ARGUMENT

1. Petitioner sought to introduce into evidence the results of a polygraph examination that he had undergone at the behest of defense counsel prior to trial and that, he alleged, would support his claim that his negotiations with Agent Short were a sham. In accordance with the Fifth Circuit's rule that such evidence is inadmissible (see *United States* v. *Cochran*, 499 F. 2d 380, 393, certiorari denied, 419 U.S. 1124), the trial court rejected petitioner's offer (Tr. 715-716). Petitioner contends (Pet. 14) that the trial court's ruling was error and that there is a conflict among the circuits concerning the admissibility of polygraph evidence that this Court should resolve.

The courts of appeals are in general agreement that the district courts need not receive into evidence the results of "lie-detector" tests. That position reflects the consensus that "the polygraph does not command scientific acceptability and * * * is not * * * sufficiently reliable in ascertaining truth and deception to justify its utilization in the trial process." *United States* v. *Alexander*, 526

F. 2d 161, 164 (C.A. 8). Indeed, the majority of the circuits that have addressed the issue agree with the Fifth Circuit that such evidence should not be admitted. *United States* v. *Skeens*, 494 F. 2d 1050, 1053 (C.A.D.C.); *United States* v. *Bando*, 244 F. 2d 833, 841 (C.A. 2) (dictum), certiorari denied, 355 U.S. 844; *United States* v. *Alexander, supra*, 526 F. 2d at 166[3]; *United States* v. *Russo*, 527 F. 2d 1051, 1058-1059 (C.A. 10), certiorari denied, 426 U.S. 906. Although the Sixth, Seventh and Ninth Circuits have declined to adopt a *per se* rule of exclusion, those courts hold that a trial court's decision to reject polygraph evidence is never an abuse of discretion. *E.g., United States* v. *Mayes*, 512 F. 2d 637, 648 n. 6 (C.A. 6), certiorari denied, 422 U.S. 1008; *United States* v. *Tremont*, 351 F. 2d 144, 146 (C.A. 6); *United States* v. *Sweet*, 548 F. 2d 198, 203 (C.A. 7), certiorari denied, April 18, 1977, No. 76-1286; *United States* v. *Infelice*, 506 F. 2d 1358, 1365 (C.A. 7), certiorari denied, 419 U.S. 1107; *United States* v. *Marshall*, 526 F. 2d 1349, 1360 (C.A. 9), certiorari denied, 426 U.S. 923; *United States* v. *Demma*, 523 F. 2d 981, 987 (C.A. 9) (*en banc*). Thus, in no circuit would the trial court's rejection of petitioner's polygraph evidence have constituted error.[4]

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[3]*United States* v. *Oliver*, 525 F. 2d 731 (C.A. 8), certiorari denied, 424 U.S. 973, cited by petitioner (Pet. 15) as falling among those decisions giving the district court discretion over the admission of polygraph evidence, was distinguished by the Eighth Circuit in *Alexander, supra*, 526 F. 2d at 170 n. 18, as involving a situation in which the government had assented to the introduction of such evidence.

[4]Petitioner substantially overstates (Pet. 6, 17) the district court's willingness to admit polygraph evidence in this case. The court refused absolutely to admit the evidence proffered by petitioner—*i.e.*, the results of a polygraph test administered by someone of petitioners's own choosing (Tr. 705). The court then said that it might

The long-standing difference in approach taken, on the one hand, by those courts of appeals that flatly prohibit the admission of polygraph evidence and, on the other, by those courts that vest the district courts with unfettered discretion to exclude such evidence does not amount to a conflict over fundamental principles warranting resolution by this Court.

2. During cross-examination by defense counsel, informant Miller denied that he had applied to the Internal Revenue Service for a reward for his cooperation with the government in a related tax prosecution (Tr. 219). After petitioner's conviction, it was discovered that Miller had in fact applied for such a reward. Petitioner moved for a new trial on the basis of Miller's false testimony.

After a plenary hearing on the motion, the trial judge who presided at petitioner's bench trial found that the prosecutor should have known that Miller's testimony was false because information concerning Miller's reward application was in the government's possession at the time of trial, and that the failure to disclose this information to petitioner violated the rule of *Brady* v. *Maryland*, 373 U.S. 83.[5] The trial judge determined, however, that even if the information had been disclosed at trial it would not have affected his assessment of Miller's credibility (H. 150-164).

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consider—but stressed that "I do not say I will do this" (*ibid.*)—admitting evidence of a polygraph test administered by someone acceptable to both petitioner and the government (Tr. 705-706).

[5]The court found that the violation was inadvertent, resulting from "oversight and negligence * * * in not searching thoroughly throughout the history of Miller and any other witness that they were going to present, to find out whether or not they had ever been paid or received any rewards and, if so, to discover that evidence and to give it to the defense" (H. 161).

Petitioner's contention (Pet. 18-22) that it was improper for the judge who found him guilty at trial to pass on the validity of his *Brady* claim is unpersuasive. When it is discovered, after a conviction, that the government's case at trial included false testimony of which the prosecutor knew or should have known, the defendant is entitled to a new trial "if there is any reasonable likelihood that the false testimony could have affected the judgment of the [factfinder]." *United States* v. *Agurs*, 427 U.S. 97, 103. See also *Giglio* v. *United States*, 405 U.S. 150, 154. Where the defendant has been tried before a jury, that determination is necessarily somewhat speculative because the jury is no longer available for consultation. Here, by contrast, no speculation was required: the factfinder at petitioner's trial, the district judge, was available to assess the impact of Miller's false testimony on the verdict and concluded that there was none. Petitioner's *Brady* claim was submitted to the one person who was in the best position to rule on its merit, and petitioner was entitled to no more.

3. Petitioner urges (Pet. 23-27) that the post-trial payment of a $15,000 reward to informant Miller constituted government misconduct requiring reversal of his conviction under the Due Process Clause of the Fifth Amendment. However, after receiving extensive testimony at the hearing on petitioner's motion for a new trial concerning the payment to Miller, the district court found that Miller had not been promised a reward prior to trial and that after trial Agent Short applied for the reward on behalf of Miller without Miller's knowledge (H. 151-152, 155). Thus, as the court of appeals observed (Pet. App. 12), Miller was not subject to any "improper, financial inducement * * * [and] had no reason unknown to the trial judge to perjure or embellish his testimony." Petitioner's unsupported allegations to the contrary were thoroughly

considered and rejected by both courts below, and there is accordingly no reason for this Court to address them. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635. Since the payment to Miller was not part of an impermissible contingent fee arrangement, it did not offend due process of law. See *Williamson* v. *United States*, 311 F. 2d 441 (C.A. 5); *United States* v. *Jett*, 491 F. 2d 1078, 1081 (C.A. 1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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